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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 832

MEHMET SABAHITTEN GIZ, *Petitioner*

v.

HERBERT BROWNELL, JR.,
ATTORNEY GENERAL OF THE UNITED STATES

On Petition For a Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions in the Court of Appeals (Pet. 18-24) are reported at 240 F. 2d 25. The opinion of the District Court appears at pages 57-59 of the record.

JURISDICTION

The judgment of the Court of Appeals was entered December 13, 1956 (Pet. 24-25). The petition for a

writ of certiorari was filed on March 12, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner, a Turkish national, applied for exemption from military service as a neutral alien in December 1942, when regulations of the Selective Service System provided that every male alien then in the country should be deemed to be "residing" here (and thus subject to the draft) if, before May 16, 1942, he failed to file an application to have his "residence" determined. Petitioner had not made such application when he applied for the exemption which was granted to him, but two years later he made an untimely application to be determined a non-resident, which was denied.

The questions are:

1. Whether petitioner signed the Selective Service exemption form, in December 1942, voluntarily and intelligently.

2. Whether, in the circumstances of this case, petitioner had a right to relitigate before the Immigration and Naturalization Service the issue of whether, when he signed the exemption form, he was a "resident" within the meaning of Section 3 (a) of the Selective Training and Service Act of 1940 and thus subject to the draft.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Training and Service Act of 1940, the pertinent Immigration Acts, and the applicable Selective Service regulations, are set forth in the Appendix, *infra,* pp. 12-16.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals affirming the denial by the District Court of his action for declaratory relief and review of the immigration proceedings finding him subject to deportation and ineligible for suspension of deportation or pre-examination on the ground that he was debarred from citizenship under Section 3(a) of the Selective Training and Service Act of 1940, by virtue of the fact that on December 31, 1942, he sought exemption from liability to military training and service as a resident alien and citizen of a neutral country.

Petitioner, a native and citizen of Turkey, was admitted to the United States on November 9, 1939, as a student (R. 59, 62).[1] On December 16, 1940, he registered for the draft and shortly thereafter was classified IV-C (exempt as a non-declarant alien), since Section 3(a) of the Selective Training and Service Act of 1940 (54 Stat. 885) originally made only those alien residents who had declared their intention to become citizens liable for service. The Act of December 20, 1941 (55 Stat. 844, 845), passed shortly after our entrance into World War II, amended Section 3(a) of the Selective Service Act to make all male persons "residing in the United States" between the ages of twenty and forty-five so liable, with a provision "That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved

[1] The symbol "R" will be used to designate the pagination of the record, and the symbol "Immig." to designate the pagination of the immigration file lodged as an original exhibit with the Court.

from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States."

On December 31, 1942, petitioner executed D.S.S. Form 301 claiming exemption from service as a resident alien and citizen of the then neutral country of Turkey (Immig. 96; R. 59, 62). This form contained the following statement on its face (Immig. 96; Pet. 23):

> I do hereby make application to be relieved from liability for training and service in the land or naval forces of the United States, under the Selective Training and Service Act of 1940, in accordance with the Act of Congress, approved December 20, 1941. *I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States.* I have not filed a declaration of intention to become a citizen of the United States. [Emphasis added.]

Petitioner's explanation of the signing of the form was that, while a sophomore in dental school, he received from the local Selective Service Board a request for his appearance. While at the board, he heard two Turkish boys arguing with the clerk of the board and heard her tell them that if they signed the form they would be relieved. He said, "It sounded to me very reasonable to sign this paper because my program to study was so heavy and by signing that I would not be bothered again and so I signed, by suggestion of the clerk" (see R. 64).

The then current Selective Service regulations provided that every male alien in the United States or entering it thereafter should be deemed to be a "male person residing in the United States" for the purposes of the Selective Service law if, before May 16, 1942 or within three months after his entry, he failed to file an application to have his residence determined.[2] Petitioner had made no such application at the time he filed his application for exemption in December 1942. On his filing of Form 301, petitioner was continued in Class IV-C as a draft-exempt alien (R. 62).

On May 31, 1944, petitioner filed an application for a certificate of non-residence (R. 22, 45-46, 59) which was denied by his local Selective Service Board on June 27, 1944 (R. 59, 62), and on July 11, 1944 he was classified II-A (medical student deferment) (R. 62, 70). On August 25, 1944, petitioner was notified by his local board that the Director of Selective Service had considered his request for non-resident status and had determined that he was " 'a male person residing in the United States' within the meaning of Sections 2 and 3 of the Selective Training and Service Act of 1940" (R. 63).

From the time of his entry in 1939 to 1944, petitioner was a student, completing a course at a junior college,

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[2] Section 611.12, 7 F.R. 855, *infra*, p. 12; Section 611.13, 7 F.R. 855, *infra*, pp. 12-13; Section 611.21, 7 F.R. 2084, *infra*, pp. 14-15. This latter regulation which became effective March 17, 1942, provided that if a non-declarant alien had legally entered the United States prior to February 16, 1942, and desired to have a determination of residence made he must have filed such application on or before May 16, 1942. Petitioner thus had from March 17, 1942 to May 16, 1942, to make such an application but he failed to do so.

and graduating from dental school in October 1944 (Immig. 60), after which he took a postgraduate course in dental surgery (Pet. 21). He took the examination entitling him to practice dentistry in April 1945 (Immig. 60). During this entire period, he had received extensions of his visa until July 21, 1945, beyond which date he remained in the United States illegally without seeking a further extension (R. 62). Nevertheless, he opened an office for the practice of dentistry and was practicing that profession at the time of the immigration proceedings (Immig. 58).

Turkey became a co-belligerent in February 1945, and petitioner was classified 1-A and ordered to report for a preinduction physical on July 26, 1946 (R. 59; Immig. 110). He was subsequently rejected because of alienage (Pet. 12). He made an effort in 1947 to have his D.S.S. Form 301 withdrawn from his Selective Service record, and his local board, in a letter to the State Director of Selective Service dated March 11, 1947, recommended that this be permitted (R. 69-70; Immig. 97). On March 17, 1947, the State Director informed the local board that this was not permissible under the statute or the existing regulations, pointing out also that petitioner, an educated man, was aware of the implications of his signing the form from the specific statement thereon that the signing would debar him from citizenship (Immig. 109).

In 1947, the deportation proceedings were instituted. The Assistant Commissioner and the Board of Immigration Appeals held that petitioner was deportable and was also statutorily ineligible for citizenship because of his application for exemption from service, and, accordingly, was ineligible for suspension of deportation (Immig. 2-9, 17-18).

Although he was granted voluntary departure, petitioner filed an action for declaratory relief in the District Court claiming that he had not been "residing in" in the United States within the meaning of Section 3(a) of the Selective Training and Service Act of 1940 and therefore was not bound by the provisions of the Selective Service form, and of the 1940 Act, debarring him from future citizenship. See *McGrath* v. *Kristensen,* 340 U.S. 162. After trial and oral argument, the district judge entered findings of fact and conclusions of law and ordered judgment for the defendant (R. 59-60). On appeal, the District Court's judgment was affirmed by a majority of the Court of Appeals; Judge Bazelon, dissenting, would have remanded the case for further administrative proceedings on the question of petitioner's residence status (Pet. 18-25).

ARGUMENT

1. Petitioner contends that when, on December 31, 1942, he executed Selective Service Form No. 301, applying for exemption from military service as a resident alien and citizen of a neutral country, he, like the petitioner in *Moser* v. *United States,* 341 U.S. 41, was unaware of the implications of his act, and did so on the suggestion of a clerk at his local draft board. As both the Board of Immigration Appeals and the two courts below have held,[3] this claim has no foundation in this record. Petitioner's own testimony at the immigration hearing shows that, in executing the form, in the midst of World War II, he was primarily interested that he (R: 64) "not be bothered again" by Selective Service demands since they threatened to

[3] On this issue, the Court of Appeals was unanimous (Pet. 20-21).

interrupt his studies (he was then a second-year dental student), and that, after hearing a conversation between the board clerk and two other students who claimed to be citizens of Turkey, a neutral country, he procured the D.S.S. Form 301 and executed it. The record refutes any suggestion that the clerk misrepresented the legal effect of signing the form. According to his own testimony, she merely stated that the form would relieve him from an obligation to serve (R. 64-65).

The form signed by petitioner plainly bore on its face the qualification that one who applied for exemption from military service as a resident alien and citizen of a neutral country would be barred from citizenship (Immig. 96). *Supra*, p. 4. Petitioner, an educated man, who was then a student in a graduate school, clearly was apprised of the consequences of his act and knew what he was doing when he executed the form. There is in this case even less substance to the claim of mistake than in *Ceballos* v. *Shaughnessy*, No. 71, this Term, decided March 11, 1957, where that petitioner claimed that in executing the form he did so "in the belief that he was required to do so to obtain assignment to a Latin American contingent of the United States Army", *Ibid.*, slip op., p. 5, fn. 11. Here, as there, the Board of Immigration Appeals found that petitioner (*ibid.*) "fully understood the legal consequences of his action and that he was not duly influenced by other considerations." And see *Francisco Ballester Pons* v. *United States*, 220 F. 2d 399, 404 (C.A. 1), certiorari denied, 350 U.S. 830.

2. Petitioner erroneously seeks to bring his case within the holding of *McGrath* v. *Kristensen*, 340 U.S.

162, by arguing that, although he executed the D.S.S. Form 301 as a resident alien and citizen of a neutral country, he was in fact a non-resident within the meaning of Section 3(a) of the Selective Service Act (*infra*, p. 12), and therefore unaffected by the citizenship bar which the execution of that form would otherwise impose.

At the time petitioner executed D.S.S. Form 301, there were in effect Selective Service regulations (Sections 611.12 and 611.13, *infra*, pp. 12-13), which ruled that every male alien then in the country, or entering it thereafter, should be deemed to be "residing" here, if, before May 16, 1942, or within three months after his entry, whichever was later, he did not file an application to have his "residence" determined. Petitioner, who executed Form 301 on December 31, 1942, had been eligible between March 17, 1942, and May 16, 1942, to make such an application but had failed to do so. See fn. 2, *supra*, p. 5. He therefore was deemed a "resident" when he executed Form 301 in December 1942, as the courts have expressly held in comparable cases. *Mannerfrid* v. *United States*, 200 F. 2d 730 (C.A. 2), certiorari denied, 345 U.S. 918; *Machado* v. *McGrath*, 193 F. 2d 706, 708 (C.A. D.C.), certiorari denied, 342 U.S. 948. Kristensen, on the other hand, had claimed exemption between February 7 and May 17, 1942, at a time when he still had an opportunity to apply for the determination of his residence, and until that latter date "he was in the same category as the newly arrived non-declarant alien who, under the regulations and the Act, did not become a resident for three months." 340 U.S. at p. 174.

Petitioner contends that, notwithstanding his failure to make a timely request for a ruling on his residence, the question of his status as a resident should now be deemed open because in May 1944 he filed an untimely application for a determination of residence which was considered by the Director of Selective Service.[4] But on that subsequent consideration the Director determined that petitioner was a resident, and did not change his status. This confirming decision on the merits cannot be said to be a waiver of the requirements of timely filing under which petitioner was barred. He was in no way misled or injured by the later consideration.

Moreover, in *Benzian* v. *Godwin*, 168 F. 2d 952 (C.A. 2), certiorari denied, 335 U.S. 886, the case upon which petitioner particularly relies (Pet. 9), the court held that such a determination by the Director of Selective Service, if it had basis in fact, was not subject to review by the courts. Here, the fact that the Director "affirmed in 1944 what the law had already determined, that Giz had been a resident for the purposes of the Act" (Pet. 24), and denied him a Certificate of Non-Residence, does not demand relitigation of the issue of his 1942 residence in further immigration proceedings, eighteen years after his entry into this country, and over fourteen years after execution of the Selective Service form. The facts stated above (*supra*, pp. 3-6) and in Judge Danaher's opinion in the Court of Appeals (Pet. 20-24) show that there was

[4] Judge Bazelon agreed with petitioner on this point (Pet. 20).

a clear basis in fact for the Director's decision as to residence.[5]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
CARL H. IMLAY,
Attorneys.

APRIL 1957.

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[5] Petitioner's attempt to enlist in 1946 after he had been placed in Class 1-A, following Turkey's co-belligerency, did not alter the effect of his claim to exemption as a neutral alien. *Ceballos* v. *Shaughnessy*, No. 71, this Term, decided March 11, 1957.

APPENDIX

Section 3 (a) of the Selective Training and Service Act of 1940, 54 Stat. 885, as amended, 50 U.S.C. App. (1946 ed.) 303 (a), provided:

> Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of nineteen and forty-five * * * shall be liable for training and service in the land and naval forces of the United States: *Provided,* That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States * * *

Selective Service regulations in force in December 1942 provided:

> § 611.12 *When a nondeclarant alien is residing in the United States.* Every male alien who is now in or hereafter enters the United States who has not declared his intention to become a citizen of the United State, unless he is in one of the categories specifically excepted by the provisions of § 611.13, is "a male person residing in the United States" within the meaning of section 2 and section 3 of the Selective Training and Service Act of 1940, as amended. [7 F.R. 855]
>
> § 611.13 *When a nondeclarant alien is not residing in the United States.* (a) A male alien who is now in or hereafter enters the United States who has not declared his intention to become a citizen of the United States is not "a male person residing in the United States" within the meaning of

section 2 or section 3 of the Selective Training and Service Act of 1940, as amended:

* * *

(b) When a male alien who has not declared his intention to become a citizen of the United States has entered or hereafter enters the United States in a manner prescribed by its laws and remains in the United States after May 16, 1942, or for more than 3 months following the date of his entry, whichever is the later, he is "a male person residing in the United States" within the meaning of section 2 and section 3 of the Selective Training and Service Act of 1940, as amended, unless he has filed an Alien's Application for Determination of Residence (Form 302) in the manner provided in § 611.21 and such application is either (1) pending or (2) has resulted in a determination that he is not "a male person residing in the United States" within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended, in either of which events he shall not be considered as "a male person residing in the United States" within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended, during the period when such application is pending or during the period covered by the Alien's Certificate of Nonresidence (Form 303) issued to him as a result of the determination that he is not "a male person residing in the United States" within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended.[6] [7 F.R. 855]

§ 611.21 *What aliens may apply for a determination.* (a) Within the time specified in para-

[6] An amendment to Selective Service Regulation 611.13 which became effective July 8, 1943, provided in pertinent part (8 F.R. 9361):

§ 611.13 *When a nondeclarant alien is not residing in the United States.* (a) A male alien who is now in or hereafter enters the United States who has not declared his intention

graph (b) of this section, a nondeclarant alien who has entered or hereafter enters the United States in a manner prescribed by its laws may file with his local board (if he is registered) or with the local board where he is at the time located (if he is not registered) an Alien's Application for Determination of Residence (Form 302), requesting that the local board determine whether he is "a male person residing in the United States" within the meaning of section 2 and section 3 of the Selective Training and Service Act of 1940, as amended. An Alien's Personal History and Statement (Form 304) must be filed with such application.

(b) An Alien's Application for Determination of Residence (Form 302) must be filed within the following time:

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to become a citizen of the United States is not "a male person residing in the United States" within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended; provided he has in his personal possession an official document issued pursuant to authorization of or described by the Director of Selective Service which identifies him as a person not required to present himself for and submit to registration and provided:

• • •

(7) He has, within the time prescribed and in the manner provided in § 611.21, filed with the local board with which he is registered, or if he is not registered, with the local board having jurisdiction over the area in which he is located, an Alien's Application for Determination of Residence (Form 302), together with an Alien's Personal History and Statement (Form 304), and such application is either pending or has resulted in the issuance by the local board of an Alien's Certificate of Nonresidence (Form 303) which has not expired; • • •.

• • •

(1) If a nondeclarant alien has entered the United States prior to February 16, 1942, in a manner prescribed by the laws of the United States and desires to have a determination made under the provisions of paragraph (a) of this section, he must file such application on or before May 16, 1942; or

(2) If a nondeclarant alien enters the United States on or after February 16, 1942, in a manner prescribed by the laws of the United States and desires to have a determination made under the provisions of paragraph (a) of this section, he must file such application within 3 months after the date of his entrance into the United States. [7 F.R. 2084].

Section 28 (c) of the Immigration Act of 1924, as amended by the Act of October 29, 1945, 59 Stat. 551, 8 U.S.C. (1946 ed.) 224 (c) provided:

The term "ineligible to citizenship", when used in reference to any individual, includes an individual who is debarred from becoming a citizen of the United States under * * * section 3 (a) of the Selective Training and Service Act of 1940, as amended (55 Stat. 845; U.S.C., title 50, App. Supp. III), section 303 (a), or under any law amendatory of, supplementary to, or in substitution for, any such sections; * * *.

The Immigration and Nationality Act of 1952, Sections 101 (a) (19) and 315, 66 Stat. 169, 242, 8 U.S.C. 1101 (a) (19), 1426, provide:

[§ 101 (a)] (19). The term "ineligible to citizenship," when used in reference to any individual, means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time, permanently debarred from becoming a citizen of the United States under section 3 (a) of the Selective Train-

ing and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under section 4 (a) of the Selective Service Act of 1948, as amended (62 Stat. 605; 65 Stat. 76), or under any section of this Act, or any other Act * * *.

* * *

[§ 315] (a). Notwithstanding the provisions of section 405 (b), any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

(b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien.

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